REL: February 25, 2022

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2021-2022

1200645

Cahaba Riverkeeper, Inc., Cahaba River Society, David Butler, and Bradford McLane

v.

Water Works Board of the City of Birmingham and State of Alabama ex rel. Steve Marshall, Attorney General

Appeal from Jefferson Circuit Court (CV-21-900732)

MENDHEIM, Justice.

Cahaba Riverkeeper, Inc., Cahaba River Society, David Butler, and Bradford McLane ("the conservation parties") appeal from a judgment of the Jefferson Circuit Court dismissing their action seeking declaratory and injunctive relief against the Water Works Board of the City of Birmingham ("the Board") and the State of Alabama, on the relation of Alabama Attorney General Steve Marshall. We reverse and remand.

I. Facts

According to the complaint, Cahaba Riverkeeper, Inc., is a nonprofit corporation that "seeks to improve the ecological integrity of the Cahaba watershed and to protect its use as an important drinking water supply." Similarly, the complaint states that Cahaba River Society is a nonprofit corporation that "seeks to restore and protect the Cahaba River watershed and its rich diversity of life, and to safeguard the supply and quality of the drinking water drawn from it." The complaint alleges that both are organizations that have "hundreds of members in Alabama who are [Board] ratepayers." Additionally, the complaint relates that Bradford McLane is a board member of the Cahaba River Society as well as "a [Board] ratepayer who lives in Jefferson County." Similarly, David Butler

is a staff attorney employed by Cahaba Riverkeeper, Inc., and, according to the complaint, is "a [Board] ratepayer who lives in Jefferson County."

At the heart of this case is a settlement agreement executed by the Board and a former attorney general on January 29, 2001 ("the settlement agreement"). The settlement agreement was a byproduct of infighting between the City of Birmingham's mayor and its city council over control of the Board and its assets. The Board is a public corporation[1] that owns and operates a water system in Blount, Jefferson, St. Clair, Shelby, and Walker Counties ("the system").[2] In 1998, the City of Birmingham ("the City") and its mayor at the time, Richard Arrington, began exploring ways to increase funding for its school system. They concluded that the most profitable method of doing so would be to sell off the assets of the system, including land, reservoirs, and filtration systems, to a private investor to

[1]This Court has observed that the Board is "a public corporation created pursuant to § 11-50-230 et seq., Ala. Code 1975." Water Works & Sewer Bd. of Birmingham v. Shelby Cnty., 624 So. 2d 1047, 1048 (Ala. 1993).

[2]Section 11-50-230(1), Ala. Code 1975, defines a "water system" as "[a] waterworks plant and distribution system, together with all appurtenances thereto and all property used in connection therewith, including franchises."

retire debts and to establish an education trust fund. To efficiently execute that plan, on September 2, 1998, the Board transferred all the assets of the system to the City for $1. However, state law required a referendum vote by the citizens of the City approving the sale to the private investor, and a referendum that same year failed. In 2000, the City's newly elected mayor, Bernard Kincaid, sought to establish a new arrangement in which the Board would operate as a City department. Members of the city council opposed that plan, desiring to keep the Board independent and to have the Board buy back the assets of the system from the City. Subsequently, the Board submitted an offer to purchase the assets back from the City for the sum of approximately $471 million (which consisted of $275 million in assumption of debt and the payment of $196 million in cash), which was accepted by the city council. In July 2000, the city council approved an ordinance to transfer the assets back to the Board; Mayor Kincaid vetoed the ordinance, but the city council overrode the veto.

On August 10, 2000, Mayor Kincaid commenced an action against the Board and the city council in the Jefferson Circuit Court, attempting

to prevent the Board from reacquiring the assets of the system. On September 8, 2000, then Attorney General Bill Pryor intervened as a defendant in that action, "on behalf of the using and consuming public to protect their interests," and asserted a counterclaim against Mayor Kincaid and a cross-claim against the city council. Attorney General Pryor's primary concern was the possibility of the Board's independently operating the system without public oversight. As already noted, on January 29, 2001, Attorney General Pryor and the Board entered into the settlement agreement, in which Attorney General Pryor agreed to withdraw the cross-claim against the city council in exchange for certain concessions from the Board. In pertinent part, the settlement agreement provided:

> "NOW, THEREFORE, in consideration of the mutual covenants set forth below, the Water Works Board, and the Attorney General hereby agree as follows:
>
> "1. Public Service Commission Jurisdiction. The parties agree that regulation of the Water Works Board by the [Alabama Public Service Commission ('the APSC')] is in the public interest because it will ensure, among other things, that ratepayer revenues are used solely for purposes related to the provisioning of water. The service territory of the Water Works Board has always exceeded the boundaries of its

authorizing municipality and the Water Works Board currently provides water to approximately one-quarter of the population of the State of Alabama. Pursuant to Ordinance No. 00-123, the City has agreed to return the assets of the Systems to the Water Works Board that will allow for regulation of the Water Works Board pursuant to the terms of this Agreement, applicable law, and the rules and regulations of the APSC, as amended from time to time. Upon the closing of the transaction as contemplated in Ordinance No. 00-123, the Water Works Board hereby agrees to adopt a Resolution ... waiving its exemption from the jurisdiction of and regulation by the APSC set out in Ala. Code § 11-50-241(b)(1992) and § 11-50-174(b)(1992), if applicable. ...

"2. Independence of the Water Works Board. A public corporation, such as the Water Works Board, is an entity separate and independent from the city it serves. The Board of Directors legally may direct the business and affairs of the Water Works Board without direction or supervision by City officials. In the event of a conflict on any issue between the APSC and the City during the term of this Agreement, the decision of the APSC will prevail and take precedence over a decision by the City.

"3. Schedule of Payments. (a) The Acquisition Agreement that will be entered into by the Water Works Board and the City pursuant to Ordinance No. 00-123 requires that the Water Works Board assume or become responsible for the payment of certain indebtedness secured by the assets and revenues of the Systems owed by the City. The Water Works Board, in the Acquisition Agreement, will also pay the City One Hundred Ninety Six Million Dollars ($196,000,000.00) as additional consideration for the City to return the assets of the Systems to the Water Works Board.

"....

"5. Re-conveyance of System Assets. The Attorney General hereby acknowledges that the re-conveyance of the Systems' assets to the Water Works Board as set out in this Agreement, Resolution No. 3995 and Ordinance [No.] 00-123 is in the public interest because (a) the assets of the Systems will be owned by an independent public corporation that will be regulated and supervised by the APSC for the next 50 years; (b) the Systems' revenues will be used solely for purposes related to the provisioning of water rather than funding general municipal needs; and (c) development of certain real property that will be acquired by the Water Works Board in the Transaction will be restricted by a conservation easement to protect the environment associated with the watershed.

"6. Third Party Beneficiaries. The ratepayers of the Water Works Board are intended to be third party beneficiaries of this Agreement and shall have full power and authority to enforce the provisions of the Agreement. Any ratepayer desiring to enforce any provisions of this Agreement must first exhaust all administrative remedies prior to instituting legal action under this provision.

"7. Conservation Easement. In order to ensure that the assets of the Systems are properly utilized to operate the Systems and to ensure that the assets of the Systems are permanently protected from any and all land development activities which could be harmful to the Systems, the Water Works Board hereby agrees to place a conservation easement on the Systems' real estate described in paragraph 7 of the Acquisition Agreement that will be entered into by the Water Works Board and the City, pursuant to Ordinance No. 00-123, under which the Water Works Board shall be the holder of said

easement. The parties will agree on the final form of the easement and the terms and conditions of the easement must be satisfactory to the Attorney General. The State of Alabama through the Office of the Attorney General, shall have a third party right of enforcement of said conservation easement for the benefit of the Systems' ratepayers. The Water Works Board agrees to record the easement in the offices of the Judges of Probate of Jefferson and Shelby Counties within 30 days of the closing of the transaction approved in Ordinance No. 00-123. The Water Works Board hereby agrees that the Attorney General shall be a 'key stakeholder' in the land use study described in paragraph 7 of the Acquisition Agreement.

"8. Term. This Agreement shall be in full force and effect for a term of 50 years and shall terminate without notice on February 1, 2051.

"9. Representation of Ratepayers. The Attorney General specifically reserves the right to take whatever action he deems necessary or advisable to protect the interests of the ratepayers during the term of this Agreement, including, but not limited to, matters involving rate, service, facilities or equipment issues. This reservation specifically includes any matters involved in implementing this Agreement. The Attorney General agrees to exhaust any applicable administrative remedies available at the APSC, if any exist, prior to initiating any legal action in the courts under this provision.

"....

"12. Governing Law. This Agreement shall be governed by, construed, and enforced in accordance with the laws of the State of Alabama.

"....

"16. Severability. In the event that any condition or provision of this Agreement is held to be invalid or against public policy by a court of competent jurisdiction, the remaining provisions shall continue in full force and effect, and all of the parties agree to use their best efforts and resources to cure any provision held invalid or against public policy."

On February 23, 2001, the City and the Board entered into an "Acquisition Agreement" providing the terms for the Board to reacquire the assets of the system from the City. Like the settlement agreement, the acquisition agreement contained a provision calling for the Board to execute a conservation easement on certain system real property:

"7. ENVIRONMENTAL ASSURANCES FOR SYSTEM ASSETS.

"In order to ensure that the assets of the System are properly utilized to operate the System and to ensure that the assets of the System are permanently protected from any and all land development activities which could be harmful to the System, the BOARD hereby agrees as follows: (A) To enter into an agreement ... with a land preservation trust such as the Alabama Forever Wild Land Trust or the Nature Conservancy of Alabama, whereby the System real estate generally described as [description omitted] shall be permanently protected from any and all land development activities which could be harmful to the System ...."

As noted in paragraph 7 of the settlement agreement, paragraph 7 of the acquisition agreement contained a description of the property to be covered by the conservation easement:

> "[A]ll real estate contiguous to Lake Purdy and located in the Sections 35 and 36 - Township 17 South - Range 1 West; Section 6 - Township 18 South - Range 1 East; and Sections 1, 2, 3, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 28, and 29 - Township 18 South - Range 1 West; and the System real estate generally described as all real estate located along the Cahaba River and north of U.S. Highway 280 and located in Sections 23, 24, 25, and 26; Township 18 South; Range 2 West. Less and except the property in the Northwest 1/4 of the Southeast 1/4 of Section 23; Township 18 South; Range 2 West where the existing Cahaba Pumping Station is located and the Southwest 1/4 of Section 26; Township 18 South; Range 2 West where the existing Cahaba River Diversion Dam is located."

In their complaint in the present action, the conservation parties allege that, on April 27, 2016, a parcel of land "subject to the settlement agreement was sold for a gas station after unanimous approval by the Board."

On October 4, 2017, the Board executed a "Conservation Easement Agreement" ("the CEA") that was subsequently filed with the probate courts of Shelby and Jefferson Counties. Because the parties dispute

whether the CEA fulfilled the requirements of paragraph 7 of the settlement agreement, we set out the pertinent portions of the CEA:

> "NOW, THEREFORE, in consideration of the terms of the Settlement Agreement and other good and valuable consideration, and the promises and conditions set forth herein, the receipt and sufficiency of which the Water Works Board hereby acknowledges, the Water Works Board hereby grants, creates, conveys and establishes a Conservation Easement upon the Property,[3] subject to the following terms and conditions:
>
> "1. Purpose of Easement. The Water Works Board agrees that the sole purpose of the restrictions imposed herein is to retain, enhance, manage, protect, and preserve the natural, scenic, forested and open spaced conditions, and wildlife habitats of the Property, in order to maintain and enhance the water quality of Lake Purdy and portions of the Cahaba River as a source of water supply, it being the specific intent of the Water Works Board to create a 'conservation easement' pursuant to the provisions of Chapter 18, Title 35, Sections 1 through 6, Code of Alabama, 1975 (hereinafter 'Conservation Easement').
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> "2. Permitted Uses. (a) The Water Works Board may continue to make such uses of the Property which are not inconsistent with the purpose of the Conservation Easement as set out in paragraph 1 herein. Such uses may include, but

[3]The "Property," as defined in the CEA, is specifically identified in Exhibit A to the CEA, which appears to provide a detailed metes and bounds description of the property more generally described in paragraph 7 of the acquisition agreement.

shall not be limited to, hunting and fishing activities, the construction and maintenance of roads, bridges, culverts, drainage facilities, hiking trails, short term camping facilities and associated structures and other improvements located on the Property to provide reasonable public access, the construction and maintenance of visitor's centers and facilities, interpretive displays and other facilities for the guidance and education of visitors, and any other activities which may be necessary or appropriate to carry out the purposes of the Water Works Board.

"(b) In the event there are portions of the Property where stormwater either naturally drains, or is engineered to drain, outside the watershed for the Water Works Board's water supply, and the Water Works Board obtains certification from a licensed engineer certifying that any such drainage is outside the Water Works Board's watershed, and that certification is affirmed by the Water Works Board's Independent Engineer (as that term is defined under the Water Works Board's Bond Indenture), and said certifications and affirmations are duly filed in the proper Probate Court, said portions of the Property shall not be subject to the restrictions of this Conservation Easement. Written notification of any conveyance made under this sub-paragraph (b) to paragraph 2, including said certifications and affirmations, shall be made to the Division Chief, Consumer Interest Division, Office of the Attorney General, State of Alabama. The provisions of this sub-paragraph (b) to paragraph 2, are continuing provisions. Said certifications, affirmations and requisite notice are required with each and every conveyance of any such portion of the Property. Without such certifications and affirmations being properly filed in the appropriate Probate Court, and notice being made to the Division Chief, Consumer Interest Division, Office of the Attorney General, State of Alabama, then such portion of the

Property shall be subject to the restrictions in this Conservation Easement.

"3. Restricted Uses. Except as provided in paragraph 2 herein, the Water Works Board hereby acknowledge[s], and agrees that the Property shall not be used for any use which is inconsistent with the purpose of the Conservation Easement as set out in paragraph 1 above. Without limiting the foregoing, the following uses of the Property shall be prohibited: the construction or improvement of any buildings, structures, or facilities used for human lodging, feeding or entertainment, including, without limitation thereto, hotels or other lodging facilities, single family or multi-family dwellings, restaurants, convention centers and meeting halls, golf courses, tennis courts, recreational dams, exhibition halls; car wash facilities; service or gasoline stations, car repair garages and any other activities which involve the commercial servicing of internal combustion engines or provide gasoline and other petroleum products for internal combustion engines; laundry and dry cleaning activities; solid waste landfills; farms or slaughter houses for animals; clear cutting of timber; mining of any type of gas or minerals; any activities which involve the use and/or disposal of pesticides or herbicides; any release of liquid discharges which would require a National Pollutant Discharge Elimination System permit (other than those already permitted); activities which result in the release of air contaminants; placement of fill materials; installation of sanitary septic systems and other similar discharges to the ground water; any activities which use or store products that constitute hazardous or toxic materials; hazardous or toxic substances, and/or hazardous wastes, as such terms are defined by any rule, regulation, statute, or law of any state, federal or local governmental agency, as the same may be amended from time to time, specifically including, but not limited to, regulations promulgated by the United States

Environmental Protection Agency; and similar activities or facilities that have a principal purpose not related to the purpose of this easement.

"4. Rights and Duties of the Water Works Board. The Water Works Board expressly reserves for itself, its successors and assigns the right to make any and all uses of the Property as long as such use is not inconsistent with the purpose of the Conservation Easement as set out hereinabove in paragraph 1. The Water Works Board's uses of the Property shall include, but not be limited to, the right to flood all or portions of the Property as may be necessary in the normal operations of its water system, the right to sell all or portions of the Property, and the right to make any other uses of the Property as may be necessary in the normal operation of its water systems.

"....

"7. Third Party Right of Enforcement. The Water Works Board expressly acknowledges and agree[s] that pursuant to the provisions of Chapter 18, Title 35, Sections 1 and 3, Code of Alabama, 1975, the Attorney General for the State of Alabama, shall have the right to enforce all of the terms and conditions of this Conservation Easement, as set out herein.

"8. Termination. The Conservation Easement, rights, and privileges granted herein shall terminate on February 1, 2051 or at such time as the Water Works Board ceases to use Lake Purdy and/or Cahaba River as a source of water supply for its water system, whichever period shall first occur.

"9. Governing Law. The validity of this Conservation Easement and of any of its items, or provisions, as well as the rights and duties of the parties to this instrument, shall be governed by the laws of the State of Alabama.

> "10. Amendment. This Conservation Easement may only be amended by the Water Works Board with the mutual consent of the Office of the Attorney General for the State of Alabama in writing."

On March 8, 2021, the conservation parties commenced in the Jefferson Circuit Court the present action against the Board, seeking declaratory and injunctive relief based on the requirement in the settlement agreement that the Board place a conservation easement on certain system property. In six counts, the conservation parties essentially contended that the CEA did not establish a valid conservation easement that fulfilled the requirements dictated in paragraph 7 of the settlement agreement. On April 26, 2021, the Board filed a motion to dismiss the complaint pursuant to Rule 12(b)(1) and Rule 12(b)(6), Ala. R. Civ. P. The Board primarily argued that the conservation parties lacked "standing" to challenge the settlement agreement. The Board also argued that the conservation parties had failed to state a claim that would allow for reconsideration of the 20-year-old settlement agreement. On April 29, 2021, Attorney General Steve Marshall, on behalf of the State of Alabama, filed a motion to intervene as a defendant in the action and a motion to

dismiss. (Hereinafter, when referring to Attorney General Marshall, specifically, we use "Attorney General," but, when referring to any holder of that office, in general, we use "attorney general.") In the motion to dismiss, the Attorney General contended that the conservation parties had failed to state a claim for which relief could be granted because, he asserted: "(1) the Attorney General has the sole authority to enforce the [CEA], (2) the Settlement Agreement does not provide an unlimited right for third-party beneficiaries to bring suit, and (3) all provisions of the Settlement Agreement that relate to the establishment of a Conservation Easement have been satisfied." Following the filing of responses and replies to those responses concerning the motions to dismiss, the circuit court held a hearing on the motions on May 24, 2021. Because the Board and the Attorney General had raised new arguments in their replies and at the hearing, the conservation parties were permitted to file a sur-reply brief addressing those arguments.

On June 2, 2021, the circuit court entered a judgment granting the Board's and the Attorney General's motions to dismiss, with its only explanation being that "the [conservation parties'] Complaint fails to state

a claim upon which relief can be granted." The conservation parties filed a timely appeal of the circuit court's judgment on June 14, 2021.

II. Standard of Review

> " 'A ruling on a motion to dismiss is reviewed without a presumption of correctness. Nance v. Matthews, 622 So. 2d 297, 299 (Ala. 1993). This Court must accept the allegations of the complaint as true. Creola Land Dev., Inc. v. Bentbrooke Housing, L.L.C., 828 So. 2d 285, 288 (Ala. 2002). We must also view the allegations of the complaint most strongly in the pleader's favor to determine whether it appears the pleader could prove any set of circumstances that would entitle the pleader [to] relief. Nance, 622 So. 2d at 299. Furthermore, we will not consider whether the pleader will ultimately prevail on the complaint but whether the pleader may possibly prevail. Id.
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> " 'For a declaratory-judgment action to withstand a motion to dismiss there must be a bona fide justiciable controversy that should be settled. Anonymous v. Anonymous, 472 So. 2d 640, 641 (Ala. Civ. App. 1984); Smith v. Alabama Dry Dock & Shipbuilding Co., 293 Ala. 644, 309 So. 2d 424, 427 (1975). The test for the sufficiency of a complaint seeking a declaratory judgment is whether the pleader is entitled to a declaration of rights at all, not whether the pleader will prevail in the declaratory-judgment action. Anonymous, 472 So. 2d at 641.

> " 'The lack of a justiciable controversy may be raised by either a motion to dismiss or a motion for a summary judgment. Smith, [293 Ala. at 649,] 309 So. 2d at 427. See also Rule 12, Ala. R. Civ. P.; Rule 56, Ala. R. Civ. P. However, a motion to dismiss is rarely appropriate in a declaratory-judgment action. Wallace v. Burleson, 361 So. 2d 554, 555 (Ala. 1978). If there is a justiciable controversy at the commencement of the declaratory-judgment action, the motion to dismiss should be overruled and a declaration of rights made only after an answer has been submitted and evidence has been presented. Anonymous, 472 So. 2d at 641. However, if there is not a justiciable controversy, a motion to dismiss for failure to state a claim should be granted. Curjel v. Ash, 263 Ala. 585, 83 So. 2d 293, 296 (1955).'
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> " Harper v. Brown, Stagner, Richardson, Inc., 873 So. 2d 220, 223 (Ala. 2003)."

Muhammad v. Ford, 986 So. 2d 1158, 1161-62 (Ala. 2007).

III. Analysis

The conservation parties contend that they stated valid claims seeking a declaratory judgment and injunctive relief on the basis that the CEA does not fulfill the Board's obligation under the settlement agreement to place a conservation easement on certain system property. Specifically, the conservation parties primarily argue that the

characteristics of the conservation easement purportedly established in the CEA do not comport with the characteristics of a conservation easement provided in § 35-18-1 et seq., Ala. Code 1975. The conservation parties also argue that the conservation easement purportedly established in the CEA does not comport with certain characteristics of the conservation easement required to be established by the settlement agreement.

Before we address the foregoing arguments in any detail, however, we note that the primary response from the Board and the Attorney General to the conservation parties' claims does not address the specific characteristics of the conservation easement purportedly established by the CEA but, rather, challenges whether the conservation parties are empowered to bring any claims concerning the conservation-easement provision in the settlement agreement, i.e., paragraph 7 of the settlement agreement.[4] The conservation parties contend that they have a third-

[4]The Board expresses its argument concerning whether the conservation parties have a right to bring claims as whether the conservation parties lack "standing." Conversely, the Attorney General argues that the conservation parties have failed to state claims for which

party right to enforce all aspects of the settlement agreement based on paragraph 6 of that agreement:

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relief can be granted because, he asserts, they are not empowered by the settlement agreement to bring claims concerning the conservation easement. The Attorney General's approach is the correct one. As this Court has now stated in a series of cases that began with Wyeth, Inc. v. Blue Cross & Blue Shield of Alabama, 42 So. 3d 1216 (Ala. 2010), "standing" is not a necessary or cognizable concept in private-law civil actions, and the actual issue being raised is often that of a failure to state a claim upon which relief can be granted. It is true that standing is still a concept applied in public-law cases, i.e., for claims asserted against government agencies. The Attorney General has intervened as a defendant in this action, but did so on behalf of citizens of the State in a matter "affecting public utility services," § 37-1-16, Ala. Code 1975, just as Attorney General Pryor intervened in the 2000 action on behalf of the Board's ratepayers, and, as observed earlier in this opinion, the Board is an independent public corporation, not a government agent.

In any event, the issue raised by the defendants here, including the Board, does not concern whether the conservation parties meet the three-prong test from the United States Supreme Court in Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), that is applied for questions of standing: " (1) an actual, concrete and particularized 'injury in fact' -- 'an invasion of a legally protected interest'; (2) a 'causal connection between the injury and the conduct complained of'; and (3) a likelihood that the injury will be 'redressed by a favorable decision.' " Alabama Alcoholic Beverage Control Bd. v. Henri-Duval Winery, L.L.C., 890 So. 2d 70, 74 (Ala. 2003) (quoting Lujan, 504 U.S. at 560-61). Instead, it concerns whether the conservation parties have a third-party right to enforce the conservation-easement provision in the settlement agreement. That is a claim issue, not a jurisdictional question of standing to sue.

> "6. Third Party Beneficiaries. The ratepayers of the Water Works Board are intended to be third party beneficiaries of this Agreement and shall have full power and authority to enforce the provisions of the Agreement. Any ratepayer desiring to enforce any provisions of this Agreement must first exhaust all administrative remedies prior to instituting legal action under this provision."[5]

(Emphasis added.)

The Board and the Attorney General counter that the only relevant provision here is paragraph 7 of the settlement agreement:

> "7. Conservation Easement. In order to ensure that the assets of the Systems are properly utilized to operate the Systems and to ensure that the assets of the Systems are permanently protected from any and all land development activities which could be harmful to the Systems, the Water Works Board hereby agrees to place a conservation easement on the System's real estate described in paragraph 7 of the Acquisition Agreement that will be entered into by the Water Works Board and the City, pursuant to Ordinance No. 00-123, under which the Water Works Board shall be the holder of said easement. The parties will agree on the final form of the easement and the terms and conditions of the easement must be satisfactory to the Attorney General. The State of Alabama through the Office of the Attorney General, shall have a third party right of enforcement of said conservation easement for the benefit of the Systems' ratepayers. The Water Works

[5]We note that neither the Board nor the Attorney General have contended that there were any administrative remedies the conservation parties needed to exhaust before filing their complaint.

> Board agrees to record the easement in the offices of the Judges of Probate of Jefferson and Shelby Counties within 30 days of the closing of the transaction approved in Ordinance No. 00-123. The Water Works Board hereby agrees that the Attorney General shall be a 'key stakeholder' in the land use study described in paragraph 7 of the Acquisition Agreement."

(Emphasis added.)

The Board and the Attorney General argue that because paragraph 7 of the settlement agreement specifically empowers the attorney general to enforce the conservation easement for the benefit of ratepayers, and because paragraph 7 of the settlement agreement provides that the terms and conditions of the conservation easement must be satisfactory to the attorney general, it follows that the grant of authority to enforce the settlement agreement in paragraph 6 of the settlement agreement does not apply to the conservation-easement provision. In other words, the Board and the Attorney General essentially contend that we should read paragraph 7 as stating that the attorney general holds "[the exclusive] third party right of enforcement of said conservation easement for the benefit of the System's ratepayers." Board's brief, p. 11 ("[P]aragraph 6 of the Settlement Agreement gave [the

conservation parties] no rights to enforce the Conservation Easement and specifically reserved any such enforcement to the Attorney General."); Attorney General's brief, p. 14 ("The directives found in Paragraph 7 thus partially preempt Paragraph 6, which designates 'ratepayers' of the Board as 'third party beneficiaries' with 'full power and authority to enforce the provisions of the Agreement.' "). In support of this argument, the Attorney General cites the rule of contract construction providing that, "[w]hen there is a conflict in a contract, the specific substantive provisions control over general provisions." ERA Commander Realty, Inc. v. Harrigan, 514 So. 2d 1329, 1335 (Ala. 1987). The Attorney General maintains that paragraph 7 is the more specific provision concerning the conservation easement and that, therefore, its statement about third-party representation of ratepayers controls over the statement in paragraph 6.

The problem with this argument, as the conservation parties observe, is that a more specific provision in a contract is prioritized over a more general provision only if a genuine conflict exists between the two provisions. "All the provisions of the contract must be construed together so as to give harmonious operation to each of them, so far as their

language will reasonably permit." City of Fairhope v. Town of Daphne, 282 Ala. 51, 58, 208 So. 2d 917, 924 (1968). See also Homes of Legend, Inc. v. McCollough, 776 So. 2d 741, 746 (Ala. 2000) ("Under th[e] established rules of contract construction, where there is a choice between a valid construction and an invalid construction the court has a duty to accept the construction that will uphold, rather than destroy, the contract and that will give effect and meaning to all of its terms."). Paragraph 6 and paragraph 7 of the settlement agreement do not, by their terms, or in reading the settlement agreement as a whole, contradict one another. Both provisions grant a third-party right of enforcement on behalf of ratepayers, a right that would not otherwise exist absent an express intent to provide it because ratepayers were not parties to the settlement agreement. See, e.g., Locke v. Ozark City Bd. of Educ., 910 So. 2d 1247, 1251 (Ala. 2005) ("[I]n order for a person to be a third-party beneficiary of a contract, the contracting parties must have intended to bestow benefits on third parties."). The fact that paragraph 7 grants the attorney general a right to enforce the conservation easement on behalf of ratepayers does not preclude ratepayers themselves from also having a right to enforce the

conservation easement under paragraph 6. The language in paragraph 6 is broad and contains no exceptions: "The ratepayers of the Water Works Board ... shall have full power and authority to enforce the provisions of the Agreement." (Emphasis added.) Furthermore, the language in paragraph 7 concerning the attorney general's right of enforcement on behalf of ratepayers does not state that this right is exclusive: "The State of Alabama through the Office of the Attorney General, shall have a third party right of enforcement of said conservation easement for the benefit of the Systems' ratepayers." In other words, paragraph 7 does not state that "only" the attorney general has a third-party right to enforce the conservation easement for ratepayers or that the attorney general holds "the" third-party right of enforcement concerning the conservation easement.[6] Therefore, because the plain language of the pertinent

[6]In contrast, paragraph 7 of the CEA states that "the Attorney General for the State of Alabama shall have the right to enforce all of the terms and conditions of this Conservation Easement, as set out herein," and it contains no provision for such a right by ratepayers. (Emphasis added.) Both the Board and the Attorney General argue that the conservation parties are actually attempting to enforce the CEA, which they have no right to do. But it is clear from the conservation parties' complaint that the reason the complaint discusses the terms of the CEA

contractual provisions does not produce a conflict, there is no reason to read paragraph 7 as overriding the right granted to ratepayers in paragraph 6.[7] Because paragraph 6 gives ratepayers a third-party right to enforce any provision of the settlement agreement, and because paragraph 7 concerning the conservation easement is one of those provisions, we conclude that the conservation parties are empowered

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is to compare those terms with what the conservation parties allege to be a legitimate conservation easement that meets the requirements of paragraph 7 of the settlement agreement. In other words, the conservation parties seek to enforce the provision of the settlement agreement requiring the Board to place a conservation easement on certain system property and they maintain that the CEA did not fulfill the terms of that provision, which is not the same as attempting to enforce the terms and conditions of the CEA.

[7]The Attorney General also argues in passing that he believes that paragraph 9 of the settlement agreement, which reserves a right to the attorney general "to take whatever action he deems necessary or advisable to protect the interests of the ratepayers during the term of this Agreement, including, but not limited to, matters involving rate, service, facilities or equipment issues," further demonstrates that he has a "superior right, as a named party to the Settlement Agreement, to enforce its provisions." Attorney General's brief, p. 16. However, paragraph 9 is more general than paragraph 7, in that it makes no mention of the conservation easement, and it contains no language limiting the right granted to ratepayers in paragraph 6. Thus, paragraph 9 adds no weight to the Attorney General's argument that the ratepayers themselves have no right to enforce the conservation-easement provision of the settlement agreement.

under the settlement agreement to bring claims concerning enforcement of the conservation-easement provision.[8]

Having concluded that the conservation parties have a general right to bring claims to enforce paragraph 7 of the settlement agreement, we now turn to the issue of the viability of the conservation parties' specific claims in their complaint. The Board and the Attorney General argued to the circuit court, and reiterate on appeal, that they believe the CEA fulfilled the Board's obligations under paragraph 7 "to place a conservation easement on the System's real estate." In contrast, as noted at the outset of this analysis, the conservation parties contend that the conservation easement purportedly established in the CEA does not meet the statutory requirements of a conservation easement (Count II) and also fails to fulfill other requirements of the conservation easement required to be established by paragraph 7 of the settlement agreement (Count I).

[8]We must view the allegations of the complaint in the light most favorable to the plaintiffs, i.e., the conservation parties, and therefore must assume at this juncture that McLane and Butler are ratepayers.

Regarding the statutory requirements of a conservation easement, the conservation parties focus on § 35-18-1, Ala. Code 1975, which provides:

> "As used in [the conservation-easement] chapter, the following words have the following meanings:
>
> > "(1) Conservation Easement. A nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, silvicultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, paleontological, or cultural aspects of real property.
> >
> > "(2) Holder. Either of the following to whom a conservation easement is conveyed:
> >
> > > "a. A governmental body empowered to hold an interest in real property under the laws of this state or the United States.
> > >
> > > "b. A charitable corporation, charitable association, or charitable trust, the purposes or powers of which include retaining or protecting the natural, scenic, or open-space values of real property, assuring the availability

> of real property for agricultural, silvicultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, paleontological, or cultural aspects of real property.
>
> "(3) Third-Party Right Of Enforcement. A right expressly provided in a conservation easement to enforce any of its terms granted to a governmental body, charitable corporation, charitable association, or charitable trust, which, although eligible to be a holder, is not a holder."

The conservation parties contend that the conservation easement purportedly established in the CEA does not qualify as a "conservation easement" under § 35-18-1 in two respects. First, the conservation parties note that, under the CEA, the conservation easement is held by the Board: "[T]he Water Works Board hereby grants, creates, conveys and establishes a Conservation Easement upon the Property." However, § 35-18-1(1) provides that a conservation easement is "[a] nonpossessory interest of a holder in real property." In other words, a conservation easement under § 35-18-1(1) is not held by the owner of the property upon which the easement is established, but the CEA states that the Board holds the

interest created by the CEA. Second, the conservation parties note that § 35-18-1(2) provides that the "holder" of a conservation easement must be either "[a] governmental body" or a charitable organization, but, the conservation parties contend, the Board is neither of those and, thus, is not a proper "holder" of a conservation easement under § 35-18-1(2).

The Board and the Attorney General primarily respond to this argument by contending that the settlement agreement did not require the creation of a conservation easement in accordance with § 35-18-1 et seq. It is true that the settlement agreement does not mention the conservation-easement statutes. Nonetheless, this is, frankly, a strange response given that the CEA expressly provided that, in executing the CEA, it was "the specific intent of the Water Works Board to create a 'conservation easement' pursuant to the provisions of Chapter 18, Title 35, Sections 1 through 6, Code of Alabama, 1975." The argument is all the more curious because conservation easements did not exist at common law. As commentators have observed, "[c]onservation easements do not fit easily into any previously existing category of property interests." Jeffrey A. Blackie, Note, Conservation Easements and the Doctrine of

Changed Conditions, 40 Hastings L.J. 1187, 1190 (1989). "Modern conservation easements are an outgrowth of three distinct common law devices that enable their owner or beneficiary to control the use of property owned by another: easements, real covenants and equitable servitudes." John L. Hollingshead, Conservation Easements: A Flexible Tool for Land Preservation, 3 Envtl. Law. 319, 325-26 (1997). In fact,

> "the uncertainty created by the old common law principles has led most States to enact legislation designed to eliminate the common law impediments to the effective use of conservation easements. In addition, the National Conference of Commissioners on Uniform State Laws adopted a Uniform Conservation Easement Act in 1981 for the same purpose."

Id. at 332-33 (footnotes omitted). The Uniform Conservation Easement Act acknowledges this expansion by making it "clear that although the character of a conservation easement may have precluded its recognition in seventeenth century England, the interest should be considered an easement by modern courts." Blackie, 40 Hastings L.J. at 1199.

> "A conservation easement is a type of negative easement which is generally unenforceable under common law due to its intangible nature. As such, many state legislatures have specifically authorized conservation easements by statute. The Alabama legislature specifically validated conservation easements in 1997 [citing Ala. Code 1975, § 35-18-1 et seq.]."

Harwell E. Coale III, Conservation Easements As Qualified Conservation Contributions, 66 Ala. Law. 124, 126 (2005). Indeed, Alabama's conservation-easement statutes are patterned after the Uniform Conservation Easement Act, and § 35-18-4 specifically recognizes that conservation easements differ from common-law easements.

> "A conservation easement is valid even though any of the following apply:
>
> > "(1) It is not appurtenant to an interest in real property.
> >
> > "(2) It can be or has been assigned to another holder.
> >
> > "(3) It is not of a character that has been recognized traditionally at common law.
> >
> > "(4) It imposes a negative burden.
> >
> > "(5) It imposes affirmative obligations upon the owner of an interest in the burdened property or upon the holder.
> >
> > "(6) The benefit does not touch or concern real property.
> >
> > "(7) There is no privity of estate or of contract."

The conservation easement's lack of common-law heritage matters because it means that the device is a purely statutory creation. Hence, by providing in paragraph 7 of the settlement agreement that "the Water Works Board hereby agrees to place a conservation easement on the System's real estate," the parties to that agreement necessarily meant that the Board was agreeing to create a "conservation easement" as described in the conservation-easement statutes because such easements exist only by virtue of those statutes.

Yet, despite the CEA's stated intent and the fact that conservation easements are statutorily created interests, the Board and the Attorney General argue that the settlement agreement does not reflect an agreement to create an interest that comports with the definition of a "conservation easement" in § 35-18-1. Indeed, the Board and the Attorney General are so steadfast on this point that neither attempts even to contend that the interest created by the CEA is "nonpossessory" in nature, as § 35-18-1(1) requires. Instead, they simply note that paragraph 7 of the settlement agreement provided that "the Water Works Board shall be the holder of said easement." However, this latter point does not protect the

interest purportedly created in the CEA because "[i]t is a well established principle of Alabama law that '[p]arties are free to contract as they will, provided they contract within the law.' Perkins v. Skates, 220 Ala. 216, 218, 124 So. 514, 515 (1929)." Ex parte Spencer, 111 So. 3d 713, 717 (Ala. 2012) (emphasis added). See also Ivey v. Dixon Inv. Co., 283 Ala. 590, 594, 219 So. 2d 639, 643 (1969) (observing that "no contract or agreement can modify a law, the exception being where no principle of public policy is violated, parties are at liberty to forego the protection of the law."). In other words, the Board and the attorney general could not agree to have a "conservation easement" placed on system property that would not fulfill the requirements of a "conservation easement" as dictated by statutory law.

The requirements that a conservation easement be nonpossessory and held by an entity other than the grantor are important because otherwise the owner of the property would also be the enforcer of the easement.

> "Essentially, a conservation servitude is a negative restriction on land prohibiting the landowner from acting in a way that would alter the existing natural, open, scenic, or ecological

> condition of the land. Typical provisions included in conservation servitudes range from a prohibition against destruction of trees, shrubs, or other greenery to a restriction to residential or existing uses. Conservation servitudes typically do not permit the holder to have physical use of or general access to the burdened parcel, but allow inspection of the land to determine compliance with the restrictions. In short, a conservation servitude seeks to preserve the environmental status quo of the burdened land by shifting some ownership rights from the owner of the servient tract to the servitude holder."

Gerald Korngold, Privately Held Conservation Servitudes: A Policy Analysis in the Context of in Gross Real Covenants and Easements, 63 Tex. L. Rev. 433, 435-36 (1984) (footnotes omitted; emphasis added). This makes sense given that "[i]t has long been recognized that, if title in fee to the dominant and servient estates is vested in one owner, the easement rights are merged in the title in fee, terminating subordinate easements. ... In other words, a person cannot have an easement to his or her own property." Gonzalez v. Naman, 678 So. 2d 1152, 1154 (Ala. Civ. App. 1996). Simply put, even though a conservation easement is a unique form

of easement, such an interest cannot exist if the owner of the property upon which the easement is granted is also the holder the easement.[9]

In sum, under § 35-18-1, the Board, as the owner of the system property, cannot simultaneously possess a "conservation easement" on that property, yet it appears that the Board is the holder of the property interest created by the CEA. Therefore, the conservation parties have stated a viable claim asserting that the CEA did not fulfill the requirement of paragraph 7 of the settlement agreement "to place a conservation easement on the System's real estate." The circuit court's judgment finding otherwise is due to be reversed.

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[9]In reaching this conclusion, we do not decide whether the Board, in general, could be the "holder" of a conservation easement as defined by § 35-18-1(2) but, rather, only that it cannot simultaneously be the owner of the servient estate and the holder of the conservation easement. In some cases this Court has held that a water works board is a "governmental entity" in certain contexts, see, e.g., City of Montgomery v. Water Works & Sanitary Sewer Bd. of City of Montgomery, 660 So. 2d 588, 592 (Ala. 1995), but we also have held that a water work's board is a "public corporation" that does not necessarily have all the same characteristics of an ordinary government entity. See, e.g., Water Works Bd. of Arab v. City of Arab, 231 So. 3d 265, 272 (Ala. 2016). We see no need at this juncture to determine whether the Board qualifies as a "government body" that can be a "holder" of a conservation easement under § 35-18-1(2).

In Counts III, IV, V, and VI of the conservation parties' complaint, they alleged that paragraph 7 of the settlement agreement required the Board "to create a conservation easement on the property that will 'ensure that said real estate is permanently protected from any and all land development activities which could be harmful to the System.' " The conservation parties further asserted that the Board had failed in this responsibility by executing the CEA because, they say: (1) the CEA provides a termination date for the purported conservation easement; (2) the CEA allows the Board and the attorney general to amend the terms of the purported conservation easement "whether or not the amendment is consistent with the Settlement's stated goal of permanent protection"; (3) the CEA provides that the purported conservation easement "does not apply to any land where stormwater naturally drains or is engineered to drain outside the watershed"; and (4) the CEA "gives the Board the authority to carry out 'any other activities which may be necessary or appropriate to carry out the purposes of the Water Works Board,' including the construction of roads." The Board's and Attorney General's central response to the foregoing claims is to argue that

paragraph 7 of the settlement agreement provided that "the final form of the easement and the terms and conditions of the easement" would be determined by the Board and the attorney general and, thus, the settlement agreement did not prohibit those terms of the CEA with which the conservation parties disagree.

The Board and the Attorney General are certainly correct that the settlement agreement leaves many details as to how the conservation easement is structured to "the parties" -- meaning the Board and the attorney general. However, it is also true that paragraph 7 of the settlement agreement expressly provided that,

> "[i]n order to ensure that the assets of the Systems are properly utilized to operate the Systems and to ensure that the assets of the Systems are permanently protected from any and all land development activities which could be harmful to the Systems, the Water Works Board hereby agrees to place a conservation easement on the System's real estate described in paragraph 7 of the Acquisition Agreement ...."

(Emphasis added.) Viewing the allegations of the complaint in the conservation parties' favor, it is conceivable that they could demonstrate that the foregoing language of paragraph 7 does not allow the conservation easement to contain provisions such as those in the CEA

with which the conservation parties take issue.[10] In other words, the conservation parties have demonstrated that there is a viable controversy about what paragraph 7 of the settlement agreement permits with respect to certain characteristics of the conservation easement, including its permanence, the specific property it must protect, and to what extent the conservation easement can be modified after it has been granted. Therefore, we conclude that dismissal of Counts III - VI of the complaint is not appropriate at this juncture of the litigation.

IV. Conclusion

Based on paragraph 6 of the settlement agreement, the conservation parties have a third-party right to seek enforcement of the terms of paragraph 7 of the settlement agreement. We also conclude that the conservation parties have stated a viable justiciable controversy with respect to whether the Board has fulfilled its obligation in paragraph 7 of the settlement agreement "to place a conservation easement on the

[10]Conversely, it is conceivable that the language of the settlement agreement is broad enough to permit the provisions of the CEA with which the conservation parties take issue.

System's real estate described in paragraph 7 of the Acquisition Agreement ...." Therefore, the circuit court's judgment dismissing the conservation parties' claims against the Board is reversed, and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Bolin, Shaw, Wise, Sellers, and Stewart, JJ., concur.

Parker, C.J., and Mitchell, J., concur specially.

Bryan, J., concurs in the result.

PARKER, Chief Justice (concurring specially).

I concur fully with the main opinion. I write specially only to address the sufficiency of the organizational plaintiffs' interest in the claims. As the main opinion notes, at this stage we must assume that the individual plaintiffs were ratepayers, as alleged in the complaint. ___ So. 3d at ___ n.8. In contrast, the complaint did not allege that the organizational plaintiffs were ratepayers. Nevertheless, the defendants have assumed arguendo that all the plaintiffs were ratepayers. I understand the main opinion as proceeding on the defendants' assumption; I do not understand the main opinion to hold that the organizational plaintiffs could assert the private contractual rights of their members.

MITCHELL, Justice (concurring specially).

I fully concur in the majority opinion, but I write separately to peel apart two analytically distinct questions: (1) whether the conservation parties' complaint alleges a "justiciable controversy" and (2) whether the complaint states claims on which relief can be granted. As the majority opinion states, a complaint seeking a declaratory judgment must allege a justiciable controversy to survive a motion to dismiss. Recently, I noted our caselaw's inconsistency about whether this requirement goes to subject-matter jurisdiction or merely the legal sufficiency of the complaint -- or, to put the question in procedural terms, whether a motion to dismiss a complaint for lack of a justiciable controversy should be analyzed under Rule 12(b)(1) or (b)(6), Ala. R. Civ. P. Russell v. Sedinger, [Ms. 1200574, Sept. 17, 2021] ___ So. 3d ___, ___ & n.3 (Ala. 2021) (Mitchell, J., concurring specially). The dominant current in our caselaw treats the requirement as jurisdictional, implying that Rule 12(b)(1) should apply.[11]

[11]See, e.g., Woodgett v. City of Midfield, 319 So. 3d 1231, 1239 (Ala. 2020) ("Because ... no justiciable controversy existed between the parties in this case when the plaintiffs filed the declaratory-judgment action, the trial court lacked subject-matter jurisdiction and properly granted the

On the other hand, this Court stated in Harper v. Brown, Stagner, Richardson, Inc., 873 So. 2d 220, 223 (Ala. 2003), that, "if there is not a justiciable controversy, a motion to dismiss for failure to state a claim should be granted." That statement has been repeated in several later opinions (typically in "Standard of Review" block quotations), creating a novel current in our caselaw suggesting that Rule 12(b)(6) should apply. See, e.g., Woodgett v. City of Midfield, 319 So. 3d 1231, 1235 (Ala. 2020); Muhammad v. Ford, 986 So. 2d 1158, 1161-62 (Ala. 2007).

Jefferson County v. Johnson, 232 Ala. 406, 168 So. 450 (1936) -- the wellspring of this Court's justiciable-controversy doctrine -- makes clear

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defendants' motion to dismiss the action."); Moore v. City of Center Point, 319 So. 3d 1223, 1229 (Ala. 2020) ("Because a trial court lacks subject-matter jurisdiction if there is no justiciable controversy, we address ex mero motu the justiciability of the issues addressed here."); City of Montgomery v. Hunter, 319 So. 3d 1213, 1222 (Ala. 2020) (similar); Ex parte Valloze, 142 So. 3d 504, 508 (Ala. 2013); Chapman v. Gooden, 974 So. 2d 972, 983-84 (Ala. 2007); Sustainable Forests, L.L.C. v. Alabama Power Co., 805 So. 2d 681, 683-84 (Ala. 2001); Hunt Transition & Inaugural Fund, Inc. v. Grenier, 782 So. 2d 270, 272-74 (Ala. 2000); Luken v. BancBoston Mortg. Corp., 580 So. 2d 578, 581 (Ala. 1991); Wallace v. Burleson, 361 So. 2d 554, 555 (Ala. 1978); Smith v. Alabama Dry Dock & Shipbuilding Co., 293 Ala. 644, 649, 309 So. 2d 424, 427 (1975); State ex rel. Bayley v. Johnson, 293 Ala. 69, 73-74, 300 So. 2d 106, 110 (1974).

that the jurisdictional approach is the right one. In Jefferson County, decided shortly after Alabama adopted the Uniform Declaratory Judgment Act, the Court acknowledged that the constitutionality of declaratory-judgment acts had been questioned because they invited "advisory opinions" and "litigation as to matters which have not ripened into justiciable controversies," exceeding the limits of "judicial power." 232 Ala. at 406, 168 So. 451. The Court explained, however, that those objections were groundless if courts policed their jurisdiction by limiting declaratory-judgment actions to justiciable controversies:

> "The weight of authority is that, to give the court jurisdiction to render a declaratory judgment, there must be 'a bona fide existing controversy, with subject-matter and parties in interest in court, and a situation where adequate relief is not presently available through medium of other existing forms of action.' ... 'Upon the ground that such statutes impose nonjudicial functions upon the judiciary, statutes authorizing declaratory judgments in cases where no other relief could be granted have been declared unconstitutional, and this is doubtless the correct view if the statute is construed to authorize such judgment in cases where there is no real case or controversy with opposing parties such as can be submitted to judicial consideration and judgment. But in view of the fact that the typical statute does not apply to moot cases, but only to actual controversies between parties before the court as to which the judgment is not merely advisory, but a conclusive determination, ... the better opinion appears to be that such

> statutes impose only judicial duties on the courts and are essentially constitutional ....'"

232 Ala. at 406-07, 168 So. at 451 (citations omitted; emphasis added). Applying this doctrine, the Court held that "the facts pleaded d[id] not constitute a justiciable controversy" and, thus, that "the [circuit] court's jurisdiction was not efficaciously invoked." 232 Ala. at 407, 168 So. at 452.

From the beginning, then, this Court has been clear that the justiciable-controversy requirement is not merely an element of stating a declaratory-judgment claim but, rather, a prerequisite of a court's jurisdiction. The absence of a justiciable controversy -- as the term implies -- means that there is simply nothing to adjudicate, no case on which judicial power can be exercised. It follows that when no justiciable controversy exists, the complaint should be dismissed for lack of subject-matter jurisdiction, not failure to state a claim.

The only case Harper cited for its "failure to state a claim" language predated the Alabama Rules of Civil Procedure and did not use the words "failure to state a claim." See Harper, 873 So. 2d at 223 (citing Curjel v.

Ash, 263 Ala. 585, 83 So. 2d 293, 296 (1955)). What Curjel actually said is that, "where no actual controversy as to a justiciable question is alleged, a demurrer to a bill seeking declaratory relief should be sustained." 263 Ala. at 589, 83 So. 2d at 296 (emphasis added). If one examines the use of the demurrer in declaratory-judgment actions before Alabama's adoption of modern civil procedure, it is clear that it encompassed both what we now call motions to dismiss for lack of subject-matter jurisdiction and what we now call motions to dismiss for failure to state a claim. Compare, e.g., Shadix v. City of Birmingham, 251 Ala. 610, 611-13, 38 So. 2d 851, 851-853 (1949) (emphasizing that the justiciable-controversy requirement is jurisdictional, then affirming the circuit court's judgment sustaining the demurrer for lack of a justiciable controversy), with Evers v. City of Dadeville, 258 Ala. 53, 59, 61 So. 2d 78, 83 (1952) (holding that, even where a justiciable controversy exists, the court may sustain a demurrer if the complaint fails on a pure legal ground). Our modern Rule 12, however, distinguishes between (b)(1) and (b)(6) motions, and that distinction should not be neglected. See Russell, ___ So. 3d at ___ n.3 (Mitchell, J., concurring specially) (noting that Rule 12(b)(1) and (b)(6)

dismissals "are subject to different waiver and preservation rules ... and have different res judicata consequences").

Indeed, for this Court to lose sight of its "well-settled, longstanding doctrine" that justiciability is jurisdictional would have troubling doctrinal consequences. Id. Our practice of allowing mandamus review of whether a justiciable controversy exists rests on the premise that justiciability goes to subject-matter jurisdiction. See Ex parte Valley Nat'l Bank, 297 So. 3d 1155, 1159 (Ala. 2019); Ex parte U.S. Bank Nat'l Ass'n, 148 So. 3d 1060, 1064 (Ala. 2014). Further, if courts come to equate the existence of a justiciable controversy with stating a claim for a declaratory judgment, declaratory-judgment complaints may survive Rule 12(b)(6) motions even when it is clear on pure legal grounds that no set of facts would allow the plaintiff to prevail -- subjecting parties to futile discovery and prolonging the resolution of obviously meritless claims.[12]

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[12]Harper already seems to endorse this unpalatable conclusion when it says that, "[i]f there is a justiciable controversy at the commencement of the declaratory-judgment action, the motion to dismiss should be overruled and a declaration of rights made only after an answer has been submitted and evidence has been presented." 873 So. 2d at 223 (citing Anonymous v. Anonymous, 472 So. 2d 640, 641 (Ala. Civ. App. 1984)).

In declaratory-judgment cases going forward, courts and litigants should take care to distinguish challenges to justiciability from challenges to whether a complaint states a claim. Here, for example, the justiciable-controversy inquiry is straightforward: each of the conservation parties' claims alleges that the Board is in breach of a contractual obligation (its obligation to create a conservation easement in accord with paragraph 7

That is simply an incomplete statement of the law; it has long been recognized that a declaratory-judgment complaint, like any other complaint, may be dismissed at the pleading stage if all the alleged facts, even if proved, would not entitle the plaintiff to relief as a matter of law. See Orkin Exterminating Co. of North Alabama v. Krawcheck, 271 Ala. 305, 311, 123 So. 2d 149, 155 (1960) (citing Shew v. City of Gadsden, 265 Ala. 253, 90 So. 2d 768 (1956)); Evers v. City of Dadeville, 258 Ala. 53, 59, 61 So. 2d 78, 83 (1952). In Orkin, the Court characterized this principle as an "exception" to the "general rule" that, when a justiciable controversy exists, "the demurrer ... should be overruled and a declaration of rights made and entered only after answer and on such evidence as the parties may deem proper on submission for final decree," language that closely tracks Harper's. 271 Ala. at 310-11, 123 So. 2d at 155. Orkin thus demonstrates beyond doubt the incompleteness of Harper's statement of the law. That said, Orkin's rule-and-exception language must be understood as a product of its time, when one procedural device (the demurrer) was used to raise both the lack of a justiciable controversy (and, thus, subject-matter jurisdiction) and failure to state a claim as a matter of law. Today, it serves no purpose to think of either Rule 12(b)(1) or Rule 12(b)(6) as an "exception" to the other; they simply address different questions.

of the settlement agreement) that the conservation parties have the right to enforce against the Board. That presents a " 'a controversy which is definite and concrete, touching the legal relations of the parties in adverse legal interest, and ... admitting of specific relief through a decree.' " MacKenzie v. First Alabama Bank, 598 So. 2d 1367, 1370 (Ala. 1992) (quoting Copeland v. Jefferson Cnty., 284 Ala. 558, 561, 226 So. 2d 385, 387 (1969)).

All remaining issues go to the Rule 12(b)(6) question whether the complaint states claims on which relief can be granted. That includes the parties' arguments about the scope of the third-party-enforcement right in paragraph 6 of the settlement agreement, the obligations imposed on the Board by paragraph 7 of the settlement agreement, and whether the CEA satisfied the Board's obligations. Because I agree with the majority opinion's analysis of those issues, I concur in full.